THE STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

APPEAL FROM THE PUBLIC SERVICE COMMISSION OF SOUTH CAROLINA

DOCKET NO. 2017-292-WS

In Re: Application of Carolina Water Service, Inc.
(n/k/a Blue Granite Water Company) for Approval
of an Increase in its Rates for Water and Sewer Services ..... Appellant.

NOTICE OF APPEAL

Carolina Water Service, Inc., now known as Blue Granite Water Company ("Blue Granite"), in Docket Number 2017-292-WS before the Public Service Commission of South Carolina ("Commission") hereby appeals Commission Order Number 2018-802, issued January 25, 2019 and Order Number 2020-57 dated January 21, 2020. Blue Granite received Order Number 2020-57 on January 21, 2020. Copies of both orders are attached as **Exhibits 1 and 2.**

Dated this 19 day of February, 2020.

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BEFORE

THE PUBLIC SERVICE COMMISSION OF

SOUTH CAROLINA

DOCKET NO. 2017-292-WS - ORDER NO. 2020-57

JANUARY 21, 2020

IN RE:	Application of Carolina Water Service, Inc. (n/k/a Blue Granite Water Company) for Approval of an Increase in Its Rates for Water and Sewer Services	) ORDER ON REHEARING) AND) RECONSIDERATION) REGARDING) RIVERKEEPER) LITIGATION EXPENSES

This matter is before the Public Service Commission of South Carolina on the Petition for Rehearing and Reconsideration ("Petition") filed by Carolina Water Service, Inc. ("CWS")[1] on February 14, 2019, in which CWS requested the Commission rehear and reconsider a portion of its rulings in Order No. 2018-802. The South Carolina Office of Regulatory Staff ("ORS") moved to dismiss the Petition because CWS filed a Notice of Appeal which divested the Commission of jurisdiction over the Petition. CWS responded in opposition to the motion to dismiss and ORS replied. The Commission granted ORS' motion to dismiss on March 7, 2019. Subsequently, the South Carolina Supreme Court dismissed CWS' notice of appeal as untimely, vacated the Commission order granting the motion to dismiss, and remanded the matter to the Commission to rule on the merits of the Petition. On remand, ORS responded in opposition to the Petition and CWS replied. On September 4, 2019, the Commission granted the request for rehearing. The parties agreed

[1] CWS recently changed its name to Blue Granite Water Company but has been referred to as CWS throughout this proceeding. To avoid confusion, the Commission will use CWS for purposes of this Order.

that an additional evidentiary hearing was not necessary and suggested oral arguments be scheduled. The Commission heard oral arguments from the parties on October 7, 2019.

I. SUMMARY OF FACTS

Order No. 2018-802 granted in part an ORS petition for rehearing and reconsideration. At the evidentiary rehearing prior to the issuance of Order No. 2018-802, the Commission heard testimony from several witnesses presented by ORS and CWS. The Commission discussed that witness testimony extensively in its Order No. 2018-802.

The portion of Order No. 2018-802 about which CWS seeks reconsideration concludes that CWS cannot recover from ratepayers $416,093 of litigation expenses associated with its unsuccessful defense of a lawsuit in the United States District Court for the District of South Carolina captioned *Congaree Riverkeeper, Inc. v. Carolina Water Service, Inc.*, Civil Action Number 3:15-cv-00194-MBS ("Riverkeeper Action"). In the Riverkeeper Action, Congaree Riverkeeper sued CWS for violations of the Clean Water Act, 33 U.S.C. §§ 1251 et seq., alleging that CWS violated its National Pollutant Discharge Elimination System ("NPDES") permit by failing to connect its I-20 wastewater treatment plant to the regional system and exceeding the NPDES discharges limit for discharges into the Saluda River set in the permit. The NPDES permit included a January 1, 1995 effective date. The Clean Water Act is a strict liability statute.

By Order entered March 30, 2017, United States District Judge Margaret B. Seymour granted summary judgment to Congaree Riverkeeper, concluding that CWS violated its NPDES permit for over seventeen years by not connecting to the regional system and by violating the discharge limitations in its permit twenty-three times.

Congaree Riverkeeper, Inc. v. Carolina Water Serv., Inc., 248 F. Supp. 3d 733, 755-56 (D.S.C. 2017). The Court ordered a $ 1,500,000 fine for the failure to connect and a $23,000 fine for the effluent limit violations. Id. The Court directed both fines be paid to the United States Treasury. Id. at 756. The Court also permanently enjoined CWS from discharging any treated or untreated waste water into the Saluda River and ordered CWS to connect to the regional wastewater treatment plant, in any manner, in accordance with the 208 Water Quality Management Plan for the Central Midlands Region ("208 Plan"). Id. at 757.

In her March 30, 2017 Order, Judge Seymour discussed extensively the history of negotiations among CWS, the Town of Lexington, and the South Carolina Department of Health and Environmental Control ("DHEC") regarding interconnection of the I-20 facility with the regional system. She also discussed the interconnection agreement between CWS and the Town of Lexington for which the Commission denied approval in 2000 because CWS had agreed to pay too high a rate for the service received which would have resulted in its customers effectively subsidizing the regional system. *See In re Application to Carolina Water Service Inc.*, Docket No. 2002-147-S, Order No. 2003-10, 2003 WL 26623818 (S.C.P.S.C. 2003). Judge Seymour considered the evidence presented and found that CWS violated its NPDES permit for over seventeen years and failed to undertake any meaningful attempt to comply with the NPDES permit between 2002 and 2014.[2] *Congaree*

[2] CWS argued there were a few communications with the Town of Lexington between 2002 and 2014 related to interconnection. The Commission has reviewed and considered the communications which were made part of the record in this proceeding in reaching its decision. It is not clear whether the communications were part of the record before Judge Seymour, but it is unlikely they would have altered her decision, as the Clean Water Act is a strict liability statute. Accordingly, "the reasonableness or bona fides of an alleged violator's

Riverkeeper, 248 F. Supp. at 755. She reasoned the NPDES permit placed the onus on CWS to engage in negotiations that would allow CWS to submit a satisfactory agreement for the Commission's approval. Id. at 747. CWS had the obligation to contract with the Town of Lexington or take other measures and steps to fulfill the permit requirements. Id. She stated that "[w]hile regional connection does require other actors' assistance and approval, [CWS] cannot be rewarded for its lack of a good faith effort to engage in negotiations and receive the required approvals." Id. at 747.

In a subsequent Order dated March 26, 2018, Judge Seymour denied in part and granted in part CWS' motion for reconsideration, granted Congaree Riverkeeper's motion for attorney fees, and denied CWS' motions to substitute the Town of Lexington as a party or join the Town of Lexington as a necessary party. The Town of Lexington, by the time of the March 26, 2018 Order, had exercised eminent domain to acquire the CWS I-20 wastewater treatment facility. Judge Seymour declined to reconsider her ruling that CWS violated the Clean Water Act by failing to connect to the regional system and by exceeding effluent limitations.

The Court also declined to vacate the $23,000 fine ordered for the twenty-three effluent limit violations. The Court vacated the $1,500,000 fine to allow discovery and argument by the parties on the appropriate fine amount for CWS' failure to connect. The Court authorized an award of attorney fees and litigation costs to Congaree Riverkeeper under 33 U.S.C. 5 1365 and Federal Rule of Civil Procedure 54(d) but did not assess the

efforts to comply with its permit is not relevant in determining whether a violator is liable under the Act." Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 890 F. Supp. 470, 496 (D.S.C. 1995).

specific amount of attorney fees. Section 1365 is part of the Clean Water Act and provides that a court "may award costs of litigation (including reasonable attorney and expert witness fees) to any *prevailing or substantially prevailing party*, whenever the court determines such award is appropriate." 33 U.S.C. 5 1365(d) (emphasis added).

After the March 26, 2018 Order, CWS, with Congaree Riverkeeper's consent, moved for the appointment of a United States Magistrate Judge to mediate the case. The Court granted the motion. The parties mediated the case, reached a settlement, and requested the Court enter a consent order approving the settlement and entering final judgment. The Court issued the requested order on March 11, 2019. The order incorporated the terms of the parties' settlement agreement. Under the monetary terms of the settlement agreement, CWS agreed to pay $385,000 of attorney fees to Congaree Riverkeeper's legal counsel; donate $350,000 to the Central Midlands Council of Governments to support implementation of its 208 Plan and water quality initiatives of the Midlands Rivers Coalition; and pay $23,000 to the United States Treasury in full satisfaction of any obligation owed by CWS resulting from the operation of the I-20 facility.

CWS is not seeking to recover from its customers the $758,000 it agreed to pay to settle the case. The Settlement Agreement terms included that CWS admitted to no violation of the Clean Water Act and the Settlement Agreement was not intended to be an admission of any liability or wrongdoing. The Settlement Agreement also provided that CWS shall have the right to use the Agreement in any proceeding to establish that the Riverkeeper Action ended "after the Court's finding of liability but before the resolution of penalties and attorneys' fees, except that CWS or its agents and/or owners may not use th[e]

Agreement to seek vacatur of the Court's March 30, 2017 summary judgment order or of any other final order issued by th[e] Court."

II. ANALYSIS AND DECISION

CWS seeks reconsideration, pursuant to S.C. Code Ann. § 58-5-330 and S.C. Code Ann. Regs. 103- 825, of Order No. 2018-802. Section 58-5-330 provides:

> Within twenty days after an order or decision is made by the commission, any party to the action or proceeding may apply for a rehearing as to any matter determined in the action or proceeding and specified in the application for rehearing and a rehearing must be granted if in the judgment of the commission sufficient reason exists. No right of appeal arising out of an order or decision of the commission accrues in any court to any corporation or person unless the corporation or person makes application to the commission for a rehearing within the time specified. The application must set forth specifically the ground on which the applicant considers the decision or order to be unlawful. The determination must be made by the commission within thirty days after it is finally submitted. If, after the hearing and a consideration of all the facts, including those arising since the making of the order or decision, the commission is of the opinion that the original order or decision, or any part of it, is in any respect unjust or unwarranted or should be changed, the commission may abrogate, change or modify it and, if changed or modified, the modified order must be substituted in the place of the order originally entered and with like force and effect.

In the Petition to Reconsider, CWS argued the Commission violated provisions of S.C. Code Ann. § 1-23-320 and the due process clauses of the South Carolina and United States Constitutions because the basis for the Commission's ruling denying recovery of litigation expenses for the Riverkeeper Action was different from the basis upon which the Commission granted rehearing. CWS also asserted it was an error of law to deny CWS recovery of litigation expenses and that its uncontradicted evidence presented to the

Commission showed its defense of the Riverkeeper Action was prudent, reasonable, unavoidable, and beneficial to ratepayers . Third, CWS argued that because the Riverkeeper Action was still pending at the time Order No. 2018- 802 was issued, the Commission should have treated the litigation expenses the same way it treated litigation expenses for other cases, by ordering CWS to establish a regulatory asset to be considered in a future rate case when the final outcome of the Riverkeeper Action was known.

This third ground is now moot because the Riverkeeper Action has concluded. CWS informed the Commission of the settlement via a supplemental memorandum filed on May 21, 2019. In its supplemental memorandum, CWS argued the settlement provided substantial benefits to customers, including that Congaree Riverkeeper agreed, for a period of five years, it would bring no legal action against CWS asserting that it failed to connect two other wastewater treatment facilities known as Watergate and Friarsgate to the regional wastewater system. CWS stated Watergate and Friarsgate were in similar situations to the I-20 facility.

The Commission has considered carefully the arguments CWS set forth orally and in writing in support of its Motion to Reconsider. These arguments, however, do not support a decision to alter the Commission's Order No. 2018-802. In Order No. 2018-802, the Commission relied, in part, on the North Carolina Supreme Court's decision in *State ex. rel. Utilities Commission v. Public Staff North Carolina Utilities Commission*, 343 S.E.2d 898 (N.C. 1986) and reasoned as follows in determining that CWS should not recover litigation expenses associated with the Riverkeeper Action from ratepayers:

> As a public utility operating under the laws of South Carolina and pursuant to its federally granted NPDES permit, CWS was required to operate its

> facilities in compliance with federal, state, and local laws. In its orders, the federal court found significant violations by CWS. While the Riverkeeper case is still ongoing as to the penalty to be imposed, the order of the federal court found CWS to be in violation of its permit. We believe it would be improper to impose these expenses upon the ratepayers when the ratepayers were already paying for the Company to provide its services in compliance with its permits and with applicable federal and state laws, and, accordingly, were not deriving any benefit from the expenditure.

Order No. 2018-802, p. 19.

With respect to the first ground for reconsideration, which CWS asserted in its Petition, CWS did not pursue this argument at the oral argument held on the Petition. Regardless, the July 11, 2018 Order granting ORS' request for the initial rehearing encompassed the grounds upon which the Commission ultimately ruled that CWS should not recover the litigation expenses at issue from ratepayers.[3] Further, to the extent CWS asserts it was not on notice of the grounds upon which ORS sought reconsideration, it is now on notice and the Commission provided another opportunity to be heard.

As for the second ground for reconsideration and CWS' supplemental memorandum, which are the primary issues now in contention, a United States District Judge granted summary judgment to the plaintiff in the Riverkeeper Action on the issue of CWS' liability for violating the Federal Clean Water Act and entered substantial fines of $1,500,000 and $23,000. Except for the $1,500,000 fine imposed for the failure to connect, Judge Seymour denied CWS' motion to reconsider her rulings. With respect to the $1,500,000 fine, Judge Seymour gave the parties an opportunity to conduct further discovery and argument on the appropriate fine amount for the failure to connect. Notably,

[3] Order No. 2018-494, issued July 11, 2018, granting a rehearing on ORS' Petition for Reconsideration stated "ORS argued that no litigation costs should be borne by the customers, if for no other reason, than that the courts ruled against CWS in the majority of the actions."

Judge Seymour did not vacate her ruling that CWS was liable for failing to connect and for exceeding effluent limitations in CWS' NPDES permit. She also did not vacate the $23,000 fine for exceeding effluent limitations on twenty-three separate occasions. Moreover, she authorized an award of attorney fees and litigation costs to Congaree Riverkeeper under a statute only allowing for such recovery to a prevailing or substantially prevailing party. The Court's orders on these issues have not been vacated (except as described above), remain operative, and provide important guidance to the Commission.

Further, CWS agreed as part of the Settlement Agreement it would not seek vacatur of these orders. No arguments or evidence has been presented which would rise to the level of leading the Commission to reach a conclusion contrary to the one reached by the United States District Court that CWS did not violate the Clean Water Act. The Court considered the arguments and evidence CWS presented to it regarding the difficulties CWS encountered in negotiating with the Town of Lexington and DHEC regarding connection of the I-20 treatment facility to the regional system. The Commission declines to reconsider its ruling that "it would be improper to impose [Riverkeeper Action litigation] expenses upon the ratepayers when the ratepayers were already paying for the Company to provide its services in compliance with its permits and with applicable federal and state laws, and, accordingly, were not deriving any benefit from the expenditure." Order No. 2018- 802, p. 19.

In its Petition for Reconsideration, CWS relied upon the South Carolina Supreme Court's decision in *City of Columbia v. Board of Health and Environmental Control*, 292 S.C. 199, 355 S.E.2d 536 (1987) and the South Carolina Court of Appeals' decision in

Midlands Utility, Inc. v. S.C. Department of Health and Environmental Control, 313 S.C. 210, 437 S.E.2d 120 (Ct. App.) Neither case is discussed in Judge Seymour's orders, and it is unclear whether they were presented to her. Regardless, both cases are clearly distinguishable from the present situation. The Supreme Court in *City of Columbia* simply held that the City was subject to regulation by DHEC, which, therefore, could order the City to acquire, by condemnation or negotiation, two private sewer systems owned by Midlands Utility ("Midlands"). *City of Columbia* did not involve violations of the Federal Clean Water Act. In *Midlands Utility*, the Court of Appeals reversed fines, issued under a state statute, associated with effluent discharge violations at the Washington Heights and Lincolnshire wastewater treatment systems, which occurred while the City of Columbia was unsuccessfully appealing an order to connect or purchase the two systems. *Midlands Utility*, 313 S.C. at 212-13, 437 S.E.2d at 121. DHEC conceded it was impossible for the Washington Heights and Lincolnshire systems to have met the pollution standards regardless of how well Midlands Utility managed them, unless they were connected to the City of Columbia or extensively upgraded. Id. at 213, 437 S.E.2d at 121. The Court of Appeals concluded fines should not have been issued for the discharge violations at the two systems because the City of Columbia was the primary cause of the continued discharges. Id.

Again, the record before the United States District Court in the Riverkeeper Action included the negotiations among CWS, Town of Lexington, and DHEC regarding the I-20 system. Nothing presented to the Commission causes it to determine the District Court's conclusion that CWS violated the Clean Water Act was incorrect. Neither *City of Columbia*

nor *Midlands Utility* dictates that the operator of a regional wastewater system is solely responsible when an NPDES permit holder, such as CWS, fails to connect with the regional system in compliance with its permit and that the NPDES permit holder cannot be liable for violating the Federal Clean Water Act. It also notable that, in *Midlands Utility*, Midlands argued fines associated with another system, the Vanarsdale system, were unwarranted where DHEC had denied its request to connect to the City of Cayce's system because granting a permit conflicted with the regional sewerage plan. Id. at 213, 437 S.E.2d at 121. The Court of Appeals held there was no abuse of discretion in imposing a penalty for the Vanarsdale system violations, which Midlands Utility did not contest occurred. Id.

CWS has not demonstrated the defense and resolution of the Riverkeeper Action conferred a substantial benefit on customers, as argued in its supplemental memorandum. The Commission would not have authorized CWS to collect from ratepayers the fines the United States District Court ordered or any altered fine later entered if the case had not settled. As for the Watergate and Friarsgate treatment facilities, CWS has stated these facilities were in a similar situation to the I-20 facility. It follows that CWS was obligated and already being paid by customers to comply with the Clean Water Act in its operation of these facilities, regardless of any agreement with Congaree Riverkeeper to delay suing CWS for five years for any alleged failure to do so. CWS secured nothing for its customers it did not already owe them.

The Commission also does not find that CWS conferred a substantial benefit on its customers by preventing the I-20 system from being shut down by the Court in the Riverkeeper Action without a plan in place for customers served by the system. CWS was

being paid by its customers to comply with its NPDES permit and find a way to connect with the regional system as required under its NPDES permit, not create an emergency where the I-20 facility was forced to stop operating without alternative arrangements for its customers having been made. In addition, a representative of Congaree Riverkeeper, Bill Stangler, testified at the evidentiary hearing on ORS' Petition for Reconsideration that Congaree Riverkeeper was not seeking to have CWS terminate sewer service to customers served by the I-20 system and that the Court allowed CWS a year to obtain a resolution to avoid that type of termination. Rehearing Transcript, pp. 267, 277, 337-38.

The Commission's determination is that CWS should not recover from its customers the legal expenses associated with the Riverkeeper Action, regardless of the reasonableness of the charges relative to the work performed, because they were incurred in defending a lawsuit in which CWS was not the prevailing party and was found liable by the United States District Court for the District of South Carolina for violating the Clean Water Act. Therefore, it is not necessary for the Commission to decide whether CWS' attorneys acted reasonably and charged reasonable fees in their defense of the Riverkeeper Action. Ratepayers already were paying CWS to provide its services in compliance with its permits and with applicable federal and state laws. For the reasons set forth herein, the Petition for Reconsideration filed by CWS on February 14, 2019, is denied.

This Order shall remain in full force and effect until further order of the Commission.

BY ORDER OF THE COMMISSION:

Comer H. "Randy" Randall, Chairman

ATTEST:

Jocelyn Boyd, Chief Clerk/Executive Director

BEFORE THE PUBLIC SERVICE COMMISSION

OF SOUTH CAROLINA

DOCKET NO. 2017-292-WS – ORDER NO. 2018-802[1]

JANUARY 25, 2019

IN RE: Application of Carolina Water Service, Inc. for Approval of an Increase in Its Rates for Water and Sewer Services) ORDER ON REHEARING

I. INTRODUCTION

By Commission Order No. 2018-494 (July 11, 2018), the Public Service Commission of South Carolina ("Commission") granted rehearing in the above-referenced Docket on four issues raised by the South Carolina Office of Regulatory Staff ("ORS"). The four issues are sludge hauling expenses, litigation costs, Friarsgate EQ basin liner project, and rate design. This Order is limited to addressing only these issues.

Originally, this matter came before the Commission on the Application ("Application") of Carolina Water Service, Inc. ("CWS" or "Company") filed on November 10, 2017, whereby CWS sought approval of an increase in rates and charges for the provision of water and sewer service and the modification of certain terms and conditions related to the provision of such service. The Application, filed pursuant to S.C. Code Ann. § 58-5-240 (2015) and S.C. Code Ann. Regs. 103-512.4.A. and 103-712.4.A (2012), employed a test year ending August 31, 2017, and sought a water revenue increase of $2,272,914 and a sewer revenue increase of $2,238,500 for a combined increase to CWS's operating revenue of $4,511,414. The proposed increase utilized a return on

[1] Although this Order, "Order on Rehearing" is being issued on January 25, 2019, a Directive was issued by the Commission on December 5, 2018, which designated Order No. 2018-802 as the order number to be assigned to this Order upon its issuance. Accordingly, although the order is being issued in 2019, the designated Order No. 2018-802 is being retained.

equity ("ROE") of 10.5% based on the rate of return methodology and a historical test year beginning September 1, 2016 and ending August 31, 2017.

On May 17, 2018, the Commission issued Order No. 2018-345 approving an ROE of 10.50% and additional operating revenues of $2,936,437 consisting of an increase in water revenues of $1,286,127 and an increase in sewer revenues of $1,650,310. The Commission also approved several changes to the terms and conditions of service, an increase in the Water Meter Installation Charge, and eliminated the base facility charge on customers with residential irrigation meters.

On May 21, 2018, CWS filed a letter with the Commission advising the Commission that CWS and ORS had determined that a correction to the rates ordered by the Commission in Order No. 2018-345 was necessary. The correction was due to the *pro forma* estimated Uncollectible Accounts calculation and resulted in an overall net reduction to revenues of $8,662. Thereafter, the Commission issued Order No. 2018-345(A) on May 30, 2018, in which the error in the *pro forma* estimated Uncollectible Accounts calculation was corrected.

On June 19, 2018, counsel for ORS filed with the Commission a Petition for Rehearing or Reconsideration ("Petition"). On June 25, 2018, CWS filed a Return to ORS's Petition. The Commission considered ORS's Petition in its weekly Commission meeting and issued Directive Order No. 2018-494. By Order No. 2018-494, the Commission granted rehearing on four issues raised by ORS (sludge hauling expenses, litigation costs, Friarsgate EQ basin liner project, and rate design) and denied reconsideration or rehearing on the remaining issues.[2] The Commission

[2] The Commission denied rehearing or reconsideration on issues raised relating to return on equity and the impact of the Federal Tax Cuts and Jobs Act.

also directed the Commission Staff to set an aggressive schedule for rehearing. By Order No. 2018-89-H dated July 12, 2018, the Hearing Officer set dates for the prefiling of testimony for the rehearing and set the date of the rehearing for September 6, 2018.

On September 6, 2018, the Commission, with Chairman Comer H. "Randy" Randall presiding, heard the rehearing arising from ORS's Petition at the Commission's Hearing Room at 101 Executive Center Drive in Columbia, South Carolina.

At the rehearing, CWS was represented by Charles L.A. Terreni, Esquire, Scott Elliott, Esquire, and John M.S. Hoefer, Esquire. Intervenor Forty Love was represented by Laura P. Valtorta, Esquire, and Intervenor James Knowlton appeared pro se. Jeffrey M. Nelson, Esquire and Florence P. Belser, Esquire represented the ORS.

At the rehearing, CWS presented the testimony of Michael R. Cartin (rehearing direct and rehearing rebuttal testimony), Robert M. Hunter (rehearing direct and rehearing rebuttal testimony), Kevin Laird (rehearing direct and rehearing rebuttal testimony), Robert H. Gilroy (rehearing rebuttal testimony), and Keith M. Babcock, Esquire (rehearing revised direct testimony). Forty Love presented the testimony of Jay Dixon (rehearing direct testimony). ORS presented the testimony of Bill Stangler (rehearing surrebuttal testimony), Daniel F. Sullivan (rehearing direct and rehearing surrebuttal testimony) and Dawn M. Hipp (rehearing direct and rehearing surrebuttal testimony).

II. REVIEW OF EVIDENCE AND EVIDENTIARY CONCLUSIONS

A. Sludge Hauling Expense

By Order No. 2018-494, the Commission granted ORS's request for rehearing on the proper amount to be included for sludge hauling expense. In Order No. 2018-345(A), the

Commission had approved CWS's requested sludge hauling expense and denied ORS's adjustment to normalize the expense. In its Petition, ORS asserted the sludge hauling expenses during the test year were atypical and should be normalized. ORS proposed an adjustment to remove $96,892 to normalize the expense. CWS argued the sludge hauling expenses were known and measurable during the test year.

CWS's Position: Mr. Cartin testified that this rate case should be based upon test year expenses. Tr. p. 34, ll. 16-17. Witness Cartin opined that the sludge hauling costs cannot be viewed in isolation and suggested that while the sludge hauling had been lowered after the April 3, 2018 hearing date that other expenses had increased. Tr. p. 34, ll. 9 – 16. He then discussed other expense categories which he stated are expected to increase due to factors occurring after the test year and in the future. Tr. p. 34, ll. 12-16; p, 35, ll. 21 – p. 36, l. 6. Upon questioning by the Commissioners and cross examination, Mr. Cartin stated that sludge hauling expenses for the test year and through the audit cut-off date were known and measurable and would continue for the foreseeable future. Tr. p. 67, ll. 19 – 24; p. 90, ll. 6-14.

At the request of the Commission, CWS witness Cartin provided an update to CWS's sludge hauling expenses from February 1, 2018 through June 30, 2018. Tr. p. 28, l. 4 – p. 29. Witness Cartin also updated the amount of sludge hauled for that same period. Tr. p. 30, line 12 – p. 31. Mr. Cartin acknowledged that the recent update provided in his testimony showed lower sludge hauling cost subsequent to the April 2018 hearing. Tr. p. 34, ll. 12-13. Responding to ORS's testimony, Mr. Cartin offered that the reduction in CWS's recent sludge hauling expenses were due to the Company taking affirmative measures to reduce sludge hauling costs (such as renting a sludge press) and optimizing plant operations. Tr. p. 36, ll. 13 – 21.

ORS's Position: ORS found the test year expenses for sludge hauling expense at the Watergate and Friarsgate Wastewater Treatment Facilities (WWTFs) atypical in comparison to the sludge hauling expenses reported by CWS for 2015 and 2016. Tr. p. 367, ll. 17-22. In reviewing CWS's Application, ORS obtained trial balances for the test year and the previous two years. Tr. p. 345, ll. 9-11; p. 351, ll. 9-10. ORS then compared the test year balances of each account with the balances for the previous two years. Tr. p. 345, ll. 11-13; p. 351, ll. 10-12. ORS set threshold criteria for dollar increases and percentage increases to identify accounts for which ORS would request explanations for the increases. Tr. p. 345, ll. 14-17; p. 351, ll. 12-14. In this case, the threshold criteria to identify accounts for which to request additional information were set at $20,000 and 10 percent. Tr. p. 345, ll. 17-20; p. 351, l. 14-16. In addition, ORS also selected additional accounts which did not meet the set threshold criteria to request additional information for review. Tr., p. 345, ll. 20-22; p. 351, ll. 16-18.

ORS witness Sullivan testified that sludge hauling expense (Account 6410) increased $150,555 or 76 percent from 2016 to 2017 and was identified as an account meeting the threshold criteria to request additional information. Tr. p. 345, l. 23 – p. 346, l. 3; p. 351, ll. 18-20. Upon request of ORS, CWS provided an explanation of the increase in sludge hauling expense and responded that the sludge hauling expense had increased partially due to control of the Friarsgate WWTF sludge inventory at the plant and that sludge hauling was also being addressed through CWS's inflow and infiltration ("I&I") capital project on the Friarsgate collection system. Tr. p. 346, ll. 1-9; p. 351, l. 20 – p. p. 352, l. 2. ORS's analysis identified the Friarsgate and Watergate business units as the units primarily responsible for the increase in sludge hauling expense. Tr. p. 346, ll. 9-13; p. 352, ll. 2-5.

ORS proposed the adjustment to normalize the expense to reflect sludge hauling expenses in a typical year and normalize CWS's operating experience. Tr. p. 347, ll. 12-15; p. 352, ll. 9-11. In calculating the adjustment of ($96,892), ORS averaged the sludge hauling expense amount for the test year and the two previous years. Tr. p. 347, ll. 8-11; p. 354, ll. 5-7. Based on responses received from CWS, ORS concluded that test year sludge hauling expense was atypical and abnormal due to a South Carolina Department of Health and Environmental Control ("SC DHEC") consent order for the Friarsgate WWTF, work being conducted on the equalization basin at the Friarsgate WWTF involving removal of large amounts of sludge, and a capital project to correct I&I issues at the Friarsgate collection system. Tr. p. 346, ll. 14–25; p. 353, l. 11 – p. 354, l.7. ORS found these conditions to be nonrecurring and contributors to the increase in sludge hauling expense. Tr. p. 347, ll. 1-4.; p. 353, l. 23 – p. 354, l. 2.

ORS recognized that, even without the SC DHEC consent order and the work on the Friarsgate system to correct I&I issues, sludge hauling expense would continue, but not at the level of the test year expense. Tr. p. 347, ll. 4-11; p. 354, ll. 2-7. Because sludge hauling expense would continue without these factors attributing to the increase in sludge hauling during the test year (the SC DHEC consent order, removal of sludge due to the EQ basin project, and the work to correct I&I issues), ORS proposed the adjustment to "normalize" test year sludge hauling expense to reflect ongoing operations. *Id.* In calculating the adjustment, ORS averaged sludge hauling expenses for 2015, 2016, and 2017. Tr. p. 368, ll. 3-10; p. 352, ll. 6-9. In calculating the adjustment in this manner, ORS's "normalizing" adjustment incorporates the test year expenses which were higher than the previous years. *Id.*

In support of this adjustment ORS witness Hipp offered that the test year sludge hauling expenses are abnormally high and do not represent normal operating conditions going forward. Tr. p. 382, ll. 7-9. Ms. Hipp also offered that, if the interconnection with the City of Columbia is completed, then the Company's sludge hauling expense will be further reduced. Tr. p. 382, ll. 10 – 16; p. 410, l. 17 – p. 411, l. 3.

Discussion: In establishing the test year for this case, this Commission stated in Order 2018-345(A) as follows:

> A fundamental principle of the ratemaking process is the establishment of a historical test year as the basis for calculating a utility's return on rate base. To determine the utility's expenses and revenues, we must select a 'test year' for the measurement of the expenses and revenues. *Heater of Seabrook v. PSC,* 324 S.C. 56, 59 n. 1 (1996). While the Commission considers a utility's proposed rate increase based upon occurrences within the test year, the Commission will also consider adjustments for any known and measurable out-of-test year changes in expenses, revenues, and investments, and will also consider adjustments for any unusual situations which occurred in the test year. When the test year figures are atypical, the Commission should adjust the test year data. See *S. Bell Tel. & Tel. Co. v. Pub. Serv. Com,* 270 S.C. 590, 603 (1978).
> (Italics added to case names.)

Order 2018-345(A), p. 6.

ORS has challenged CWS's test year sludge hauling expense as atypical for the test year and not reflective of ongoing sludge hauling expense for the future period. As noted above, this Commission recognizes that a test year should be adjusted when the test year figures are shown to be atypical. "The object of test year figures is to reflect typical conditions. — Where an unusual situation exists which shows that the test year figures are atypical the [C]ommission should adjust the test year data." *Parker v. S.C. Pub. Serv. Comm'n*, 280 S.C. 310, 312, 313 S.E.2d 290, 292 (1984). "The test year is established to provide a basis for making the most accurate forecast of

the utility's rate base, reserves, and expenses in the near future when the prescribed rates are in effect. … Where an unusual situation exists resulting in test year figures that are atypical and thus do not indicate future trends, the Commission should adjust the test year data." *Porter v. S.C. Pub. Serv. Comm'n*, 328 S.C. 222, 228–29, 493 S.E.2d 92, 96 (1997) (internal citations omitted).

ORS reviewed the test year sludge hauling expense because the test year amount increased 76 percent or $150,555 from 2016 to 2017. From information supplied by CWS, ORS concluded the increase was attributed to control of sludge inventory at the Friarsgate WWTF pursuant to a SC DHEC consent order, work being performed on the equalization basin at Friarsgate WWTF, and work on I&I issues at Friarsgate. ORS further concluded that the work pursuant to the consent order, the work on the equalization basin, and the I&I project were non-recurring events.

In response to ORS's adjustment to sludge hauling and at this Commission's request, CWS provided an update to CWS's sludge hauling expenses from February 1, 2018, through June 30, 2018. Tr. p. 28, l. 4 – p. 31. CWS's witness Cartin admitted that the expenses after the April 2018 hearing in this case were lower. Tr. p. 22, 8-10. Mr. Cartin stated that a major factor contributing to the decrease in sludge hauling for the updated period provided in this rehearing is the use of sludge press that began after CWS hired an outside contractor to operate the Friarsgate WWTF in late February 2018. Tr. p. 22, ll. 12-23.

We find that ORS's adjustment of ($96,892) to normalize sludge hauling expense for the test year to be appropriate. On its face, the increase in the expense account of 76 percent or $150,555 required additional scrutiny from ORS. That review identified several factors which ORS concluded were nonrecurring and which this Commission agrees are nonrecurring. Accordingly, we find an adjustment to normalize test year sludge hauling expense proper and the

amount of the adjustment to be reasonable. ORS used an average of the test year and the two preceding years. This calculation of the adjustment provides some effect of the higher expense amount of the test year tempered by the expense amounts from the prior two years to provide a reasonable forecast of future expense.

CWS's position that the sludge hauling expense was known and measurable for the test year and would continue for the foreseeable future provides no assistance with determining whether the expense should be normalized. There is no dispute the test year expense was known and measurable. Likewise, there is no dispute that CWS will continue to experience sludge hauling expense. ORS has raised a tenable issue of the amount of the expense due to the dollar amount increase and percentage increase over the previous year. While ORS identified several non-recurring factors which increased the amount of test year expense, CWS provided no evidence or explanation to refute that the higher sludge hauling expenses in the test year were non-recurring. We find ORS's proposal to normalize sludge hauling expense appropriate to reflect normal operations.

We are not persuaded by CWS's argument that the normalization expense is not appropriate because other expenses would increase in the future. Similarly, we are not convinced by CWS's contention that ORS's normalization adjustment is an issue viewed in isolation and not in the context of the overall operating perspective as a routine cost of doing business. The adjustment recommended by ORS and adopted in this Order was based on the test year expense and ORS's further inquiry into the amount of the test year expense which was much larger from the two previous years.

This adjustment is being considered in the context of a full rate case where CWS has proposed *pro forma* adjustments and other adjustments based on known and measurable occurrences. CWS's income and expenses have been examined in the context of this comprehensive rate case. If during the rate case, CWS was aware of verifiable increases in other expense categories, CWS had the opportunity to present those matters in this case. The adjustment does not take into account any expenses or occurrences after the test year. The adjustment is based on an average of the test year expense and annual expense of the two prior years, and, as noted above, the adjustment moderates the higher than normal test year amount with annual expenses of the two previous years. The sludge hauling expense is not eliminated or reduced to zero but is adjusted to reduce the amount of the expense from the abnormal test year expense amount to an amount more reflective of normal operations. CWS receives coverage for sludge hauling expense but at an amount adjusted to reflect normal operations.

B. Litigation Costs

At the original hearing in April 2018, CWS had sought, and been awarded by Order No. 2018-345(A), recovery of $998,606 in litigation expenses to be amortized over 66.67 years. In its Petition, ORS challenged the allowance of litigation expenses related to several actions in federal court, state court, and the Administrative Law Court ("ALC"). In granting rehearing, the Commission requested that disaggregated litigation expenses be provided and specified that expenses for each legal action be provided along with a description of each legal action and an outcome or status of each case. Order No. 2018-494. CWS provided disaggregated expenses by case. ORS asserted that inclusion of the litigation costs as an allowable expense forces ratepayers to pay for CWS's failure to comply with environmental laws and also requires ratepayers to pay

for an unsuccessful defense of a civil action. CWS argued in response that the Company had to defend itself against lawsuits, that the litigation expenses are a cost of doing business, and that the expenses are known and measurable.

CWS's Position: On rehearing, CWS is seeking to recover $991,509[3] which when amortized over the requested 66 2/3 years results in an annual expense of $14,894. Tr. p. 23, ll. 13 – 16; p. 32, 1-11. Rehearing Exhibit 8, Appendix B. Upon request of the Commission in its Order granting rehearing, CWS provided a breakdown of litigation expenses by case. Tr. p. 33. Rehearing Exhibit 8, Appendix B. CWS seeks recovery of litigation expenses for the case of *Congaree Riverkeeper, Inc. v. Carolina Water Service, Inc.* (Civil Action Number 3:15-cv-00194-MBS) ("*Riverkeeper*") in the amount of $395,196; for the case CWS filed against the United States Environmental Protection Agency ("US EPA") and the Town of Lexington in the amount of $146,420; for the ALC case of the SC DHEC Permit denial of $233,223; for the ALC case related to the I-20 Connection of $51,039; and for the condemnation case of $78,482. Tr. p. 33. In addition, CWS seeks recovery of expenses of $12,320 and Advances of $74,828. *Id.*

CWS witness Cartin asserted that ORS's recommendations on the treatment of litigation expenses was inconsistent because ORS recommended that litigation expenses related to the condemnation case and the ALC cases be assigned to a regulatory asset while recommending denial of the litigation expenses associated with the two federal court cases. Tr. p. 42, ll. 17-23.

[3] The amount of litigation expenses sought on rehearing is lower than the amount originally sought and awarded by the Commission. Upon inquiry by ORS of certain invoices, CWS admitted that three invoices totaling $5,617 were improperly included in the calculation of litigation expense and that an additional $1,480 was also removed as not being associated with the I-20 litigation. Tr. p. 23, ll, 13-22; p. 32, ll. 1-11; p. 43, ll. 1-12. Also, the amounts listed below total $991,508 (the difference with this amount and what CWS is seeking to recover on rehearing, $991,509,is due to rounding).

CWS presented Keith M. Babcock, Esquire to address the reasonableness of the attorneys' fees for which CWS seeks recovery in this Docket. Tr. p. 196, ll. 18-23. Mr. Babcock explained that he met with CWS's counsel and received an overview of the five different cases that form the basis for the litigation expenses. He reviewed the pleadings, motions, court filings, and the legal bills from the cases. He noted that there were two federal cases – one being the *Riverkeeper* lawsuit and the other being the lawsuit filed by CWS against the US EPA, two ALC cases, and the condemnation case.

Witness Babcock stated that, once the *Riverkeeper* lawsuit was brought, CWS had no choice but to fight the suit "as hard as they could." Tr. p. 205, ll. 1-6. He stated that the idea of bringing the lawsuit against the US EPA to change the 208 plan or force the interconnection was "an excellent one" and "good legal" strategy but he acknowledged that the lawsuit against the US EPA was a long shot. Tr. p. 205, l. 7-18. The two ALC cases involved the SC DHEC permit – one was the case involving the permit denial and the second was a challenge to a SC DHEC order requiring CWS to present plans to construct a connection to the Town of Lexington's line. Tr. p. 205, l. 19 – p. 206, l. 1. This second ALC case was "a protection appeal" to protect CWS in the event the permit denial was upheld. *Id.* The condemnation case was filed by the Town of Lexington to condemn CWS's I-20 wastewater system. Tr. p. 223, ll. 6-9. Mr. Babcock characterized the condemnation as a unique situation because the Town of Lexington started the condemnation after being forced by SC DHEC to do so. *Id.*

Mr. Babcock opined that the attorneys' fees charged as a result of the litigation concerning these five cases were reasonable. Tr. p. 222, ll. 1-3. Mr. Babcock described his review of the invoices and his analysis under the factors listed in Rule 407, SCACR, Rule 1.5. He also

referenced the standard used by South Carolina courts in some cases. From his analysis, Mr. Babcock stated his opinion that the fees and costs at issue are "incredibly reasonable." Tr. p. 219, ll. 5-10; p. 229, ll. 18-20.

ORS's Position: In this rehearing, ORS requests that the Commission amend its ruling in Order No. 2018-345(A) to deny recovery of the litigation expenses attributed to the two federal court cases and to establish a regulatory asset for litigation expenses related to the Town of Lexington's condemnation case and the two ALC cases. Tr. p. 366, l. 18 – p. 367, l. 13.

ORS requests the Commission disallow $155,974 in legal expenses where the description of professional services was redacted. Tr. p. 394, l. 20 – p. 395 l. 6; Rehearing Exhibit 16, Rehearing Exhibit DMH-4; Rehearing Exhibit 18, Surrebuttal Rehearing Exhibit DMH-2. ORS identified adjustments necessary to properly disaggregate litigation expenses between the five court cases utilizing CWS's starting balances. Tr. p. 395, ll. 7–18. Rehearing Exhibit 16, Rehearing Exhibit DMH-5. ORS further identified adjustments necessary to properly allocate advances between the court cases. Tr. p. 417, l. 14 – p. 418, l. 7. Rehearing Exhibit 18, Surrebuttal Rehearing Exhibit DMH-2.

ORS requests the Commission deny recovery of the litigation expenses associated with the *Riverkeeper* lawsuit, deny recovery of the litigation expenses associated with the suit brought by CWS against the US EPA, and deny recovery of undocumented and unsupported expenses and advances CWS did not assign to legal actions and did not provide documentation to support. Tr. p. 366, l. 18 – p. 367, l. 13; p. 418, l. 8 – 9.

ORS requests the Commission establish regulatory assets in the amount of $124,603, $173,283, and $36,521 for the Town of Lexington's condemnation case and the two ALC cases

respectively. Rehearing Exhibit 18, Surrebuttal Rehearing Exhibit DMH-2. The remainder of the $991,509 in litigation expenses results in a balance of $657,102 associated with the federal court cases and undocumented and unsupported advances which ORS believes CWS did not assign to legal actions and did not provide documentation to support.

ORS objects to the recovery of the litigation expenses related to the federal court cases because these cases stem from CWS failing to provide service in compliance with its DHEC permits and State and federal law. Tr. p. 369, ll. 5 - p. 370, l.15. p. 412, ll. 12-18. CWS was found by the federal court to have violated the Clean Water Act and was fined by that court. *Id.* ORS witness Hipp stated that ORS's position related to these litigation expenses rests on the policy that ratepayers should not bear the burden of legal costs related to CWS's failure to operate its I-20 sewer system in accordance with its NPDES permit. Tr. p. 382, l. 19 – p. 383, l. 2. ORS does not challenge the reasonableness of the fees, the hourly rates, or the hours spent. Tr. p. 473, ll. 10-13. However, ORS does challenge requiring the ratepayer to pay these expenses for litigating the *Riverkeeper* and *US EPA* lawsuits because the expenses are not expenses related to providing adequate sewer service to the customers but result from a failure to manage the I-20 system to comply with the NPDES permit requirements. Tr. p. 387, ll. 13 – 15. The federal court order made several findings regarding CWS's violations of its NPDES permit. Tr. p. 413, l. 15 – p. 414, l. 16.

Alternatively, should the Commission not agree with ORS's position to deny the litigation expenses related to the *Riverkeeper* federal court case, ORS requests that the following adjustments be made to the litigation balance associated with the *Riverkeeper* lawsuit. ORS requests the Commission remove $79,178 in litigation expenses due to redactions on the invoices which limited ORS's ability to review the description of work performed. Tr. p. 418, l. 14 – p. 419,

l. 20; Rehearing Exhibit 18, Surrebuttal Rehearing Exhibit DMH-2 and Rehearing Exhibit 16, Rehearing Exhibit DMH-4. The legal invoices contain numerous entries with work descriptions which detail the work performed for different legal cases. *Id.* Billed time was not separated by legal action. *Id.* Where redactions occurred in the work description, ORS states that it could not verify the legal action to which the redaction should be attributed and how the time should be allocated. *Id.*

ORS presented Bill Stangler, the Congaree Riverkeeper, as a witness. Mr. Stangler stated that the citizen lawsuit his agency brought in federal court *Congaree Riverkeeper, Inc. v. Carolina Water Service, Inc.* (Civil Action Number 3:15-cv-00194-MBS) was brought in an effort to bring CWS's I-20 facility into compliance with their Clean Water Act permit. Tr. p. 265, ll. 7 – 20. The permit required the I-20 plant to connect to a regional wastewater treatment system and cease discharging into the Lower Saluda River. *Id.* Yet, years later, discharges from the I-20 plant continued, and there were numerous effluent limitation violations from the I-20 facility. *Id.* Mr. Stangler stated that *Riverkeeper* case sought to address both the connection to a regional treatment system and the numerous effluent limitation violations. *Id.* Mr. Stangler testified that the Congaree Riverkeeper monitors all sorts of sites and polluters in the watershed and takes enforcement action when necessary, Tr. p. 265, l. 21 – p. 266, l. 21. He also testified that CWS's pattern of ongoing effluent violations was one of the issues which brought the CWS I-20 facility to the Congaree Riverkeeper's attention and was a key factor in deciding to file the lawsuit. *Id.*

Mr. Stangler also discussed the federal court's ruling in the *Riverkeeper* lawsuit. In March 2017, the federal court issued its order holding that CWS violated the Clean Water Act permit by failing to connect to the regional system for over 15 years and by repeatedly violating multiple

effluent limits in its permit. Tr. p. 278, ll. 1-5. The court imposed a $1.5 million-dollar penalty against CWS for violation of the connection requirement and a $23,000 fine against CWS for violation of the effluent limits. *Id.* Following motions of the court's order, the federal court granted reconsideration on the $1.5 million penalty because the parties had agreed that they would present evidence on an appropriate penalty if CWS was found liable and the parties had not had a chance to present such evidence at the time of the Court's ruling. Tr. p. 278, ll.6 – p. 279, l. 2. The case is still ongoing with respect to an appropriate penalty of the violation of the requirement to connect. *Id.* The federal court did not grant reconsideration on its ruling that CWS had violated its NPDES permit for failing to connect to the regional facility and for exceeding the effluent limitations. *Id.*

Discussion: CWS seeks recovery of expenses related to cases in litigation in federal court, state court, and the ALC. All of these cases arise from the issues with CWS's I-20 system. ORS opposes recovery of the litigation expenses related to the federal cases and requests that the expenses related to the ALC cases and the condemnation case be booked to a regulatory asset for review in a future rate proceeding after those cases are concluded.

This Commission recognizes that these cases must be reviewed carefully because an underlying contention related to all the cases involves numerous violations of CWS's NPDES permit. When litigation involves claims asserting failure of the utility to adhere to state or federal law, we must look carefully at the matter to determine whether expenses associated with defending the action should be included in rates paid by customers.

(a) Federal Court Cases – The federal court cases arose when the Congaree Riverkeeper filed a citizen lawsuit in 2015. Following the filing of the *Riverkeeper* lawsuit, CWS

filed an action for a declaratory judgment and injunction against the US EPA and the Town of Lexington.

CWS through witnesses Cartin and Babcock have asserted that CWS must defend itself when litigation is filed. Mr. Gilroy testifying for CWS stated that CWS has sought interconnection with the Town of Lexington on several occasions. Tr. p. 168, l. 3 – p. 171, l. 10. Mr. Gilroy recounted several instances where CWS approached the Town of Lexington about interconnection, but these attempts were not successful. *Id.*

ORS witness Hipp stated ORS's position that ratepayers should not bear the burden of legal costs related to CWS's failure to operate its I-20 sewer system in accordance with its NPDES permit. Tr. p. 412, ll. 12-18. Witness Hipp also stated that these costs should be the responsibility of CWS's shareholders, otherwise no incentive exists for regulated utilities to operate in compliance with federal, state, and local laws. *Id.*

In response to the Order Granting Rehearing, CWS provided expert testimony from Mr. Babcock on the reasonableness of the attorney's fees incurred. Mr. Babcock described his analysis and concluded that the attorney's fees incurred in the litigation were reasonable. ORS witness Hipp stated that ORS was not contesting the reasonableness of the attorney's fees, but rather the propriety of requiring the ratepayers to pay these costs incurred by CWS. Tr. p. 473, ll. 10-13.

In considering this issue, the Commission is mindful that it must balance the interests of the utility with those of the ratepayer. In reviewing the record before us, we find that recovery of the litigation expenses related to the *Riverkeeper* case should be denied, but the recovery of litigation expenses related to the action brought by CWS against the US EPA and the Town of Lexington should be allowed to be amortized.

With regard to the *Riverkeeper* litigation, CWS seeks recovery of expenses defending its noncompliance or failure to comply with the obligations contained in its NPDES permit. CWS was not successful in defending this action in federal court. We find that ratepayers should not be responsible for the payment of litigation expenses incurred in defending this action in which the ratepayers derived no benefit from the expenditures. This Commission agrees with the statement of Witness Hipp that allowing recovery of expenses related to defending this action brought about by CWS's own noncompliance with its NPDES permit provides no incentive for regulated utilities to operate in compliance with federal, state, or local laws.

S.C. Code Ann. Regs 103-570(A) requires CWS to "comply with all laws and regulations of State and local agencies pertaining to sewerage service." S.C. Code Ann. Regs. 103-540 (2012) requires CWS to "operate and maintain in safe, efficient and proper conditions all of its facilities and equipment used in connection with the services it provides to any customer."

While we have located no South Carolina case addressing this issue, we are aware of the North Carolina case of *State ex. rel. Utilities Comm'n v. Pub. Staff, N. Carolina Utilities Comm'n,* 317 N.C. 26, 343 S.E.2d 898 (1986), and this case provides guidance on this issue of recovery of litigation expenses. In this case, the North Carolina Supreme Court reversed a decision by the North Carolina Utilities Commission allowing inclusion of utility legal fees in approved operating expenses resulting from the utility contesting a penalty that had been assessed for failure to provide adequate service. The North Carolina Supreme Court noted that the legal fees in question were not associated with the utility's provision of water service but were a result of the utility's failure to provide adequate water services in the first place. The North Carolina Supreme Court concluded it would be improper to require ratepayers to pay for the utility's penalty-related legal fees through

inclusion in the utility's regulated expenses. The North Carolina Supreme Court also concluded that the expense could not be considered reasonable or necessary because the utility could have avoided the expense if the utility had carried out its responsibility of providing adequate service. 317 N.C. 26, 41, 343 S.E.2d 898, 907-8.

As a public utility operating under the laws of South Carolina and pursuant to its federally granted NPDES permit, CWS was required to operate its facilities in compliance with federal, state, and local laws. In its orders, the federal court found significant violations by CWS. While the *Riverkeeper* case is still ongoing as to the penalty to be imposed, the order of the federal court found CWS to be in violation of its permit. We believe it would be improper to impose these expenses upon the ratepayers when the ratepayers were already paying for the Company to provide its services in compliance with its permits and with applicable federal and state laws, and, accordingly, were not deriving any benefit from the expenditure.

In contrast, we hold that litigation expenses in the federal case brought by CWS against the US EPA and the Town of Lexington should be allowed to be amortized. CWS's witness Babcock indicated that, although the case was dismissed and would have been difficult to win, the filing of that litigation was a smart strategic effort to try to unlock the logjam created by the 1997 208 Plan and the inability of CWS to gain an interconnection of the I-20 system to the Town of Lexington. (Tr. p. 224, ll. 20-24). For this reason, we believe that the Company was serving ratepayer interests when it filed this action, and, therefore, should be compensated for its effort by being allowed litigation expenses.

(b) ALC Cases – CWS seeks recovery of litigation expenses related to two cases pending in the ALC. These two cases are held in abeyance pending the court case involving the

condemnation of the I-20 sewer system by the Town of Lexington. Tr. p. 385, l. 18 – p. 386, l. 2. CWS shows the litigation expenses related to both cases as totaling $284,262, with expenses of $233,223 attributed to the ALC SC DHEC Permit Denial case and expenses of $51,039 attributed to the ALC I-20 Connection case. Tr. p. 33. However, ORS witness Hipp addressed the reallocation of $19,759 in attorneys' fees, classified by CWS as expenses related to the ALC SC DHEC Permit Denial case, as attorneys' fees related to the *Riverkeeper* case. Tr.p. 395. ll. 7-12; Rehearing Exhibit 18, Surrebuttal Rehearing Exhibit DMH-2. Witness Hipp also addressed reallocation of $2,985 in attorneys' fees, booked by CWS to the ALC I-20 Connection case, as attorneys' fees were expenses related to the condemnation case. Tr. p. 395, ll. 13–18; Rehearing Exhibit 18, Surrebuttal Rehearing Exhibit DMH-2. ORS Witness Hipp proposed adjustments to the claimed litigation expenses to remove $40,181 from the ALC DHEC Permit Denial case and to remove $11,534 from the ALC I-20 Connection case. Rehearing Exhibit 18, Surrebuttal Rehearing Exhibit DMH-2. These two adjustments proposed by ORS related to removal of legal fees where redactions of the descriptions limited ORS's review of the work performed. Tr. p. 394, l. 20 – p. 395, l. 6; Rehearing Exhibit 18, Surrebuttal Rehearing Exhibit DMH-2. Company witness Cartin's rehearing rebuttal testimony stated that, even with the redactions, the invoices provide ample basis to allow recovery of these expense. (p 6 of 7, Cartin rehearing rebuttal testimony). Considering the invoices submitted in confidential Exhibit DMH-4, the Commission agrees with witness Cartin that these expenses are proper. With these adjustments, the litigation expenses proposed by ORS for the ALC SC DHEC Permit Denial case are $173,283 and for the ALC I-20 Connection case are $36,521 totaling $209,804. Rehearing Exhibit 18, Surrebuttal Rehearing Exhibit DMH-2. The Commission finds that the litigation expenses to be allowed for deferral, as

discussed below are $213,463 for the ALC – DHEC Permit Denial case and $48,054 for the ALC I-20 Connection case after adding back the redacted invoices removed by ORS.

Because these cases have not yet concluded, and no final order has been issued, ORS asserts it would be premature to allow recovery of litigation expenses related to these two cases. Tr. p. 391, l. 1- p. 392, l. 2. ORS recommends establishment of a regulatory asset in which to defer the litigation expenses associated with these two ALC cases and for ratemaking treatment to be deferred until a future rate proceeding. *Id.* ORS also recommends that the regulatory asset be limited to litigation expenses for the ALC cases, that the regulatory asset not be allowed to accrue carrying costs, and that the amortization period for the regulatory asset deferral be established during the next rate proceeding after all facts related to the cases are known. *Id.*

The Commission finds ORS's recommendation to establish a regulatory asset in which to defer the litigation expenses associated with these two ALC cases reasonable and appropriate. Given that the cases are not concluded and all facts surrounding the cases are not yet known, it is appropriate to establish a regulatory asset to defer ratemaking treatment of these litigation expenses. The regulatory asset for these litigation expenses shall be limited to litigation expenses for these ALC cases, the regulatory asset shall not accrue carrying costs, and the amortization period for the regulatory asset deferral shall be established during the next rate proceeding after all facts related to the cases are known

(c) Condemnation Case – At the hearing CWS stipulated that it agreed to place the litigation expenses related to the condemnation case in a regulatory deferral account to be carried without carrying costs until the next rate case when the results of that case are known. Tr. p. 245, l. 23 – p. 246, l. 14. This was the position of ORS with regard to the litigation expenses associated

with the condemnation case. Tr. p. 383, l. 11 – 16. Therefore, upon the agreement of CWS and ORS, the expenses associated with the condemnation proceeding of $124,603[4] are to be placed in a regulatory deferral account without carrying costs. This amount includes an update from ORS's surrebuttal testimony to include $52,442 in advances paid for consulting services which originally had not been assigned to a specific litigation case. Tr. p. 417, l. 10 – 16. The deferral should be further adjusted to include $9,306 in invoices that ORS removed due to redactions. The total amount to be deferred for the Condemnation case is $133,909.

(d) Expenses and Advances – ORS made an adjustment of $20,377 to remove expenses related to the Winston and Strawn invoices. Tr. p. 415, l. 9 – p. 416, l. 6; Rehearing Exhibit 18, Surrebuttal Rehearing Exhibit DMH-2 and Rehearing Exhibit 16, Rehearing Exhibit DMH-2. CWS had categorized $19,912 of the Winston & Strawn invoices as work and expenses related to the *Riverkeeper* case, but the invoices indicated the work was for a matter that was not the *Riverkeeper* case. *Id.* The remaining $465 was categorized under the Expenses category on surrebuttal rehearing Exhibit DMH-2, Hearing Exhibit No. 18. We agree that the Company's Winston & Strawn invoices should be disallowed in this case, based on the description of work performed relating to employee benefits and executive compensation, and that expenses and allowances be included net of reallocations and disallowances. ORS also reallocated $73,491 in mailing, court reporting, and advances paid to Berkeley Economic Consulting, Inc. Tr. p. 418, ll. 3-7; Rehearing Exhibit 18, Surrebuttal Rehearing Exhibit DMH-2. Of the reallocation, $21,049 should be reassigned to the *Riverkeeper* case and $52,442 should be reassigned to the Town of Lexington condemnation case. ORS also proposed to re-allocate $19,760 to the *Riverkeeper*

[4]Tr., p. 33; Tr. p. 44, ll. 7-10; Rehearing Exhibit 18, Surrebuttal Rehearing Exhibit DMH-2.

lawsuit for legal hours incorrectly attributed to the legal action ALC-DHEC Permit Denial. CWS originally included these costs and attorneys' fees in the ALC Permit denial case when these costs were in fact incurred in the *Riverkeeper* case. Tr. p. 395, ll. 7-12. We agree with ORS with regard to the $19,760. In addition, we accept ORS's correction of allocations from the I-20 Connection case with a reassignment of $2,985 to the Town of Lexington condemnation case.

Further, with regard to the $155,975 removed by ORS due to redactions reflected on legal invoices, we disagree. ORS recommended the Commission exclude $155,974 in fees resulting from any item on any invoices that included a redaction. Citing one example of an invoice entry where the nature of the legal matter was unclear, the ORS objected to 152 such invoices. (Tr. p. 418, l. 14 - p. 419, l. 11; Exhibit 16 and Conf. Exhibit 17). ORS claimed the Company's need to protect the confidentiality of attorney-client communications or attorney work product was irrelevant. (Tr. p. 419, l. 21 - p. 420, l. 3). Mr. Cartin, a former ORS employee, testified that he had never encountered a circumstance where the ORS stood behind redactions to deny recovery of legal fees. (Tr. p. 44, l. 12 - p. 45, l. 2). The ORS position raises concerns over a utility's ability to recover legitimate litigation costs while protecting confidential information and litigation strategy. ORS disallowed expenses even when otherwise detailed time entries had one or two words redacted. (See Exhibit 16 and Conf. Exhibit 17). The mere presence of a redaction in a time entry is not sufficient to justify its rejection. This issue must be examined on a case-by-case basis. Examination of the invoices in this case indicates to this Commission that the redacted material would not prevent a reader from determining what work was performed. Accordingly, in this case, we reject this exclusion, and hold that these costs should be allowed and included in

amortization amounts. Below is a table showing litigation expenses allowed, litigation expenses disallowed, and litigation expenses deferred:

Litigation Expenses

Summary of Adjustments	CRK v. CWS	Town of Lex v. CWS (condemnation)	ALC - DHEC Permit Denial	ALC - I-20 Connection	CWS v. EPA	Expenses and Advances	TOTAL
Starting Balance	$ 395,196	$ 78,482	$ 233,223	$ 51,039	$ 146,420	$ 87,148	$ 991,508
ORS Adj - Exh DMH-4	$ -	$ -	$ -	$ -	$ -	$ -	$ -
ORS Adj - Exh DMH-2	$ (19,912)	$ -	$ -	$ -	$ -	$ (465)	$ (20,377)
ORS Adj - Exh DMH-3*	$ -	$ -	$ -	$ -	$ -	$ (73,491)	$ (73,491)
ORS Adj - Exh DMH-5	$ 19,760	$ 2,985	$ (19,760)	$ (2,985)	$ -	$ -	$ -
Advance Rallocation - Surrebuttal	$ 21,049	$ 52,442	$ -	$ -	$ -	$ -	$ 73,491
Ending Balance	**$ 416,093**	**$ 133,909**	**$ 213,463**	**$ 48,054**	**$ 146,420**	**$ 13,192**	**$ 971,131**
Deny all legal expenses for CRK v. CWS	$ (416,093)	$ -	$ -	$ -	$ -	$ -	**$(416,093)**
Defer legal expenses for condemnation and ALC**	$ -	$ 133,909	$ 213,463	$ 48,054	$ -	$ -	**$ 395,426**
Grant legal expenses for CWS v. EPA and other expenses***	$ -	$ -	$ -	$ -	$ 146,420	$ 13,192	**$ 159,612**

*Of the $73,491, the amount reallocated to the CRK v. CWS case was $21,049 and $52,442 was reallocated to the Town of Lexington v. CWS condemnation case

** Defer legal expenses for condemnation and ALC for consideration in a future rate proceeding

*** These expenses are to be amortized over 66.67 years

We also hold that all legal expenses approved for recovery in this Order shall be amortized over the previously approved period of 66.67 years, with no carrying costs. In addition, the Company is authorized to make any further adjustments that may fall out of the decision described in this Order.

C. Friarsgate EQ Basin Liner Project

In its Petition, ORS requested reconsideration with CWS recovering expenses associated with the replacement of the Equalization Liner ("EQ Project"). ORS asserted that the work on the EQ Project was not completed and that recovery of expenses in this case was not appropriate because the liner was not yet "in service" and did not meet the "used and useful" standard of

providing service to customers. In Order No. 2018-494, this Commission granted rehearing of this issue and stated that it would consider an update on the status of the EQ Liner replacement including expenditures and the projected final completion date. Order No. 2018-494.

CWS's Position: CWS witness Cartin addressed the expenses associated with the EQ Project. He explained the remediation work on the EQ Project was required by SC DHEC Consent Order 16-039-W, which required CWS "to remove and properly dispose of the solids and grit from the EQ basin and complete repairs to the basin liner" at the Friarsgate WWTF. Tr. p. 25, ll. 5 – 12; see also, Tr. p. 140, ll. 12 – 16. The remediation work began in September 2017, but was not completed until February 2018, because it was more involved than originally anticipated. Tr. p. 25, ll. 13 – 16. CWS witness Laird offered that the expenses of the remediation would have been required even if CWS had not planned to replace the EQ Liner. Tr. p. 141, ll. 1 – 7.

In November 2017, SC DHEC notified CWS that both Richland County and the City of Columbia had treatment capacity for the flow from the Friarsgate WWTF. Tr. p. 26, ll. 1 – 12. This notice triggered a condition in CWS's NPDES permit for the facility to affect an interconnection with an available regional wastewater provider. *Id.* CWS entered into discussions with both Richland County and the City of Columbia and, in February 2018, CWS chose to proceed with the City of Columbia for an interconnection agreement. *Id.* Thereafter, based on the recommendation from its engineering consultant, CWS decided to incorporate the EQ basin work scope into the interconnection project. Tr. p. 26, l. 13 – p. 27, l. 3. Mr. Cartin then explained that CWS is not seeking recovery of any costs associated with the EQ liner repair project phase in this case but that CWS will seek to recover the costs of the interconnection project, which now encompasses the EQ basin liner repair, in its next general rate proceeding. Tr. p. 27, ll. 14 – 19.

Presently, the EQ basin project was approved in Order No. 2018-682, dated October 30, 2018 , but awaits Midlands Region Council of Governments' approval of an amendment to the 208 Water Quality Management Plan that would permit the equalization basin to remain in operation after decommissioning of the Friarsgate WWTF. Tr. p. 139, l. 20 – p. 140, l. 5

ORS's Position: The EQ Project began on May 16, 2017 and was identified by CWS as Project #2017093. Tr. p. 396, l. 13 – p. 397, l. 16. CWS requested $1,081,375 be included in plant-in-service for this Project which was to replace the equalization basin liner at the Friarsgate plant. *Id.* This project was not completed by April 3, 2018, (which was the first day of the hearing on CWS's Application) and was not providing service to CWS's customers. *Id.* ORS therefore adjusted CWS's pro-forma plant-in-service by $1,081,375 to exclude the EQ Project from this rate case. *Id.* ORS's reasoning for excluding this project was the fact that the plant covered by the EQ Project was not yet "in service" and was not "used and useful." Tr. p. 397, ll. 17 – p. 398, l. 15.

Subsequent to the April hearing, CWS provided ORS with updates on the EQ Project and responded to discovery requests from ORS related to this rehearing. Responses to ORS's discovery requests initially revealed that the EQ Project (originally designated as Project #2017093) had been separated into two phases. Tr. p. 398, l. 19 – p. 399, l. 5. CWS's testimony filed for the rehearing further revealed that the project has been separated into three phases. Tr. p. 373, ll. 4- 13. Phase 1 is for the project expenses related to soil remediation, Phase 2 is for the project expenses related to the line installation and the interconnection with the City of Columbia, and Phase 3 is for the project expenses related to the Friarsgate collection system infrastructure repairs and replacement. *Id.*

After CWS divided the Project into the different phases, witness Hipp recommended $1,079,132.84 remain as plant-in-service for Phase 1 site remediation work and Phase 3 collection system infrastructure repairs. Tr. p. 373, ll. 4 – 17'; p. 420, l 21 – p. 421, l. 13. As a result of the changes and reclassifying the project into different phases, ORS recommends an adjustment to remove $2,242.51. Tr. p. 373, ll. 18 – 23. This adjustment to plant-in-service removes $2,130.00 for the portion of the vendor invoices related to costs to reinstall grass matting in the proper location after the matting where the grass matting was installed at the wrong location and also removes $112.51 for late fees paid to vendors that should not be charged to CWS's customers by the Company. Tr. p. 373, ll. 18 – 23; p. 400, l. 14 – 22; p.421, ll. 7 – 8.

Discussion: CWS and ORS are in agreement that $1,079,133 should remain in plant-in-service. Following the April 2018 hearing, CWS modified the project from one large project to two separate phases (one being the remediation work and the other being the repair of the liner). Following the negotiations with the City of Columbia for interconnection of the Friarsgate plant, the repair phase was modified into two distinct phases with one phase being the project expenses related to the line installation and the interconnection with the City of Columbia and the second phase being the project expenses related to the Friarsgate collection system infrastructure repairs and replacement. This Commission finds it appropriate to keep this agreed upon amount of $1,079,133 in plant-in-service as costs of the remediation work (Phase 1 site remediation work) and the collection system infrastructure repairs (Phase 3) have been completed and are in service. CWS has now included the EQ liner repair in the phase which includes the cost of the interconnection project and has expressed its intention to seek recovery of those costs in the next general rate proceeding. ORS's adjustment totaling ($2,242.51) for extra costs related to re-

installing grass matting which was installed at the wrong location ($2,130.00) and for late fees ($112.51) is approved. We conclude that ratepayers should not pay for the mistake of the vendor installing the matting in the wrong location or pay for late fees incurred by CWS. Further, we note that CWS did not contest ORS's adjustment.

D. Rate Design

By its Petition, ORS questioned the adoption of the rate schedule set forth in Order No. 2018-345(A). ORS maintained the rates approved in Order No. 2018-345(A) were only presented by CWS in its proposed Order, which was filed after the record in the case was closed and no discussion in the Order explained the manner of the approved rate design. Petition, page 4. In granting rehearing on this issue, the Commission directed the parties to describe the method used to determine rates. Order No. 2018-494.

CWS's Position: CWS's witness Hunter addressed the issue of rate design. Mr. Hunter explained the two Water Service Territories and difference in the Water Supply Customers and the Water Distribution Customers. Tr. p. 107, ll. 11-14. He also described the rate structure for sewer service customers. Tr. p. 108, ll. 21 – p. 109, l. 2. For the water service customers, Mr. Hunter explained the Base Facilities Charge ("BFC") is set according to the size of a customer's meter and stated the BFC is the same for Water Supply Customers and Water Distribution Customers with the same meter size. Tr. p. 107, ll. 14 -16. In addition to the BFC, water service customers pay a Commodity Charge for the water consumed, but the Commodity Charge for Water Supply Customers is different from the Commodity Charge for Water Distribution Customers Tr. p. 107, l. 16 – p. 108, l. 2. Sewer service customers pay the same rates regardless of whether the customer received sewer treatment and collection service or Collection-Only service. *Id.*

For CWS's water service, the rates in the two service territories are different. Tr. p. 108, ll. 3-4. The rates for water service in each service territory were calculated using the financial statements created to establish the cost of service for each service territory with revenue required to earn the approved 10.50% ROE. Tr. 108, ll. 3 – 13. Mr. Hunter stated that he created financial statements for the test year and applied known and measurable adjustments to establish a unique cost of service for the different service territories. Tr. p. 109, ll. 3 – 13. This process allowed him to calculate the current ROE (before the increase) that each service territory was earning. *Id.* He then calculated the incremental revenue required in each service territory to reach the 10.50% ROE approved by the Commission. *Id.* He then used the rate structure approved in the previous rate case and adjusted the current BFC and Commodity Charge by applying a percentage increase to all rates within each respective service territory to arrive at the revenue required to earn the 10.50% ROE. *Id.* Each set of rates was calculated using the financial statements created for each service territory to establish the cost of service along with the revenue requirement to achieve the allowed 10.50% ROE. Tr. p. 109, ll. 14 – 20.

In Rebuttal testimony, Mr. Hunter addressed ORS's concern that the revenue requirement in CWS's proposed order was different from the revenue allocation contained in the Application. Tr. p. 115, ll. 10 – 15. Witness Hunter reiterated that CWS allocated the revenue requirement to each service territory based on the cost of service for that service territory. Tr. p. 116, ll. 1 – 9. To address why the rates requested in the Application differed from those offered by CWS in the proposed order, Mr. Hunter stated that the rates in the proposed order were based on the revenue requirement calculated on the cost of service for each service territory after adjustments during the audit performed by ORS and using any other known and measurable adjustments which arose

between the Application being filed and the proposed order. Tr. p. 116, ll. 15 – 21. One specific example related to an adjustment made by ORS to adjust pro-forma property taxes. ORS identified that CWS had allocated property taxes to Water Service Territory 1, which should have been allocated between Water Service Territory 1 and the unified Sewer Service Territory. Tr. p. 116, l. 21 – p. 117, l. 5. Mr. Hunter also noted that the rates offered by ORS in its proposed order did not account for changes in cost of service to the service territories but were calculated by applying the percentage of total revenue requirement allocated to each service territory from CWS's Application to the adjusted revenue requirement determined by ORS. Tr. p. 117, l. 21 – p. 118, l. 6.

ORS's Position: In explaining ORS's position on this issue of rate design, witness Hipp acknowledged the Commission has the discretion to establish rates to distribute the revenue requirements in an equitable manner among the Company's customers but explained ORS's concern that the revenue allocation in Order No. 2018-345(A) resulting in an unexpected decrease to a portion of water customers in Service Territory 1 was not transparent or may not be fair to the remaining customers in Service Territory 1 and Service Territory 2. Tr. p. 404, ll. 12-22. At the hearing, Ms. Hipp explained the reason for the reduction was not apparent and ORS raised the objection to have the issue examined in the event the revenue allocation was misallocated or a classification of customer was disadvantaged. Tr. p. 437, ll. 3 – 14.

In her direct pre-filed testimony, Ms. Hipp discussed that CWS in its Application had represented that a rate increase would result for all commercial and residential water customers in Service Territory 1 and Service Territory 2 and the notice of the hearing had reflected these increases. Tr. p. 401, ll. 8 -17. Further witness Hipp explained CWS had presented testimony

indicating a rate increase was necessary for all water customers in both service territories. Tr. p. 401, l. 18 – p. 402, l. 7. Ms. Hipp then explained the proposed order submitted by CWS presented an allocation of the revenue requirement for the water customer in Service Territory 1 which differed from the rates requested in the application and noticed to the Customers. Tr. p. 402, l. 12 – p. 403, l. 2. Specifically, the rate schedule contained in CWS's proposed order deviated from the revenue allocation contained in the Application and CWS's testimony from the hearing by decreasing the base facilities charge ("BFC") and commodity charge from the currently approved rates for all water supply customers in Service Territory 1 and by decreasing the BFC from the currently approved rate for all water distribution customers in Service Territory 1. *Id.* CWS did not provide an explanation of the revenue allocation resulting in a reduction of the BFC for all water supply and distribution customers in Service Territory 1, and a reduction in the commodity rates for all water supply customers in Service Territory 1. Tr. p. 403, l. 12 – p. 404, l. 3.

During its review of the rate case, ORS calculated the percentage of the total revenue requirement attributed to sewer, purchased water and water supply customers within Service Territory 1 and Service Territory 2 to verify the accuracy and fairness of the rates contained in CWS's Application. Tr. p. 405, ll. 1-18. In its proposed order, ORS replicated the revenue allocation based on the rates proposed in the Application and applied as close as practicable the allocation percentage to the proposed revenue requirement to determine the revenue requirement for each customer class. *Id.* ORS then designed rates which kept as close as practicable the revenue allocation proposed in the Application and verified by ORS. *Id.* Witness Hipp offered that ORS was not recommending rates be increased for customers in Service Territory 1, but requested that should the Commission re-evaluate the approved revenues requirement in the context of the

rehearing that the revenue requirement allocation be reviewed to ensure no customer class is disadvantaged. Tr. p. 405, l. 19 – p. 406, l. 3

After reviewing CWS's explanation of the allocation of the revenue requirement contained in the surrebuttal testimony of CWS's witness Hunter, Ms. Hipp acknowledged that ORS more fully understands how the rate schedule was developed. Tr. p. 421, ll. 15 – 20. Further, Ms. Hipp stated that the details and explanation provided through CWS's rebuttal testimony of witness Hunter satisfy ORS's concern with the revenue allocation contained in Commission Order No. 2018-345(A) and that ORS considers the issue resolved. Tr. 441, ll. 11 - 25.

Discussion: Based upon the evidence presented including ORS's acknowledgement that the explanation and details provided by CWS in the rebuttal testimony of CWS witness Hunter alleviate ORS's concern, the Commission finds that the revenue allocation contained in CWS's proposed order and adopted by the Commission in Order No. 2018-345(A) is appropriate and correct. CWS explained the methodology utilized in its revenue allocation, and the Commission finds that the revenue allocation is based upon the cost of service for each service territory taking into account the adjustments adopted by the Commission in the Order which includes the reallocation of property taxes from Water Service Territory 1 to Water Service Territory 1 and the unified Sewer Service Territory. While CWS and ORS approached the calculation of the revenue requirement in different ways, we find the method proposed by CWS and adopted in Order No. 2018-345(A) to be reasonable and appropriate. This method captures the known and measurable adjustments which arose between the Application being filed and the issuance of the proposed order and which were adopted in the Order. Further, ORS agrees that the revenue allocation employed by CWS and adopted in Order No. 2018-345(A) is appropriate.

We would note that ORS has included language in its proposed order which would require CWS to provide a calculation of the amount of refund due to customers to account for the difference in rates being charged pursuant to Order No. 2018-345(A) and this Order. Further, ORS has also stated in its proposed order that CWS should provide a proposed method of refunding or crediting the customers affected by the difference in the rates. Neither ORS, nor any other party, presented any evidence in the record regarding the appropriateness, nor the amount of any refunds resulting from the issuance of this Order on Rehearing. Further, no evidence was presented in the record regarding any proposed method of refunding or crediting the customers. For these reasons, neither refunds nor credits are ordered in this Order. However, this Commission does believe and so holds that, going forward, rate reductions will result as addressed *infra*, because of the revenue decrease resulting from our Order herein.

III. FINDINGS OF FACT

1) CWS is a water and sewer utility providing water and sewer service in its assigned service area in South Carolina. The Commission is vested with authority to regulate rates of every public utility in this state and to ascertain and fix just and reasonable rates for service. S.C. §58-5-210, et. seq. CWS's operations in South Carolina are subject to the jurisdiction of the Commission.

2) The Commission granted rehearing of its Order No. 2018-345(A) on four specific issues: sludge hauling expenses, litigation costs, Friarsgate EQ basin liner project, and rate design.

3) Aside from the four specified issues on which rehearing was granted, all other issues decided in Order No. 2018-345(A) are not subject to review in this rehearing. The Commission accepts the ORS adjustment of ($96,892) to normalize test year sludge hauling expense.

4) Litigation expenses associated with the *Riverkeeper* federal court case are denied. Such expenses associated with the CWS federal court case against the EPA and the Town of Lexington are granted, and are to be amortized over 66.67 years.

5) Litigation expenses associated with the two ALC cases are to be placed in a regulatory asset, and this regulatory deferral account shall be limited to litigation expenses related to the two ALC proceedings and shall not accrue carrying costs.

6) Litigation expenses associated with the condemnation case are to be placed in a regulatory asset, and this regulatory deferral account shall be limited to litigation expenses related to the condemnation proceeding and shall not accrue carrying costs.

7) For work related to the EQ Basin Liner Project and associated projects, $1,079,133 shall remain in plant-in-service, and $2,242 shall be removed from plant-in-service.

8) The Commission approves all fallout adjustments to interest expense, miscellaneous revenue, uncollectible accounts, cash working capital, customer growth, revenue taxes, and state and federal income taxes as a result of the adjustments approved herein.

9) The approved rate base following the adjustments adopted herein is $55,509,028.

10) The revenue requirement herein is $111,734 less than the revenue requirement contained in Order No. 2018-345(A).

11) The rate design as contained in Order No. 2018-345(A) is appropriate and shall be continued.

12) Based on the rehearing adjustments adopted in this case, the Company shall lower its Sewer Service Revenue by $111,990, which will cause the average sewer customer's bill to decrease by about $0.68 (68 cents) a month. The Company shall calculate a new schedule of rates

and charges to achieve the Company's new revenue requirement, and shall file it with the Commission and serve it on the Office of Regulatory Staff within ten (10) days of receipt of this Order.

13) The resultant Operating Margin will be 13.28%. The return on equity will remain at 10.50% and the Return on Rate Base will remain at 8.62% as previously set by the Commission in Order No. 2018-345(A).

IV. CONCLUSIONS OF LAW

Based upon the discussion, findings of fact, and the record of the instant proceeding, the Commission makes the following Conclusions of Law:

1) CWS is a public utility as defined in S.C. Code § 58-5-10(3) and is subject to the jurisdiction of this Commission.

2) The appropriate test year on which to set rates for CWS is the twelve-month period beginning September 1, 2016, and ending August 31, 2017.

3) Based on the information provided by the parties, the Commission concludes the rate setting methodology to use as a guide in determining the lawfulness of CWS's proposed rates and for fixing just and reasonable rates is return on rate base.

4) For CWS to have the opportunity to earn the 10.5% ROE, found fair and reasonable herein, CWS must be allowed additional revenues of $2,824,661.

V. ORDERING PROVISIONS

IT IS THEREFORE ORDERED THAT:

1) CWS shall furnish new tariffs reflecting the adjustments described in this Order within ten (10) days of receipt of this Order.

2) All other requirements of Order No, 2018-345(A) remain in full force and effect.

3) This Order will remain in full force and effect until further order of the Commission.

BY ORDER OF THE COMMISION:

Comer H. "Randy" Randall, Chairman

Elliott F. Elam, Jr., Vice Chairman

THE STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

RECEIVED

FEB 19 2020

S.C. SUPREME COURT

APPEAL FROM THE PUBLIC SERVICE COMMISSION OF SOUTH CAROLINA

DOCKET NO. 2017-292-WS

In Re: Application of Carolina Water Service, Inc.
(n/k/a Blue Granite Water Company) for Approval
of an Increase in its Rates for Water and Sewer Services .....Appellant.

PROOF OF SERVICE

This is to certify that I, Toni C. Hawkins, paralegal with the law firm of Robinson Gray Stepp & Laffitte, LLC have this day served a copy of **Notice of Appeal** on the parties below by placing a copy of same in the United States Mail, postage prepaid, in envelopes addressed as follows:

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Dated this 19th day of February, 2020.

Toni C. Hawkins